Filed 6/1/09 P. v. Supek CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANDREJ SUPEK, Defendant and Appellant.	B209412 (Los Angeles County Super. Ct. No. VA101600)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger T. Ito, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan M. Martynec and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Andrej Supek was convicted of one count of petty theft with a prior jail term (count 2) and one count of assault with a deadly weapon (a screwdriver) (count 3). (Pen. Code, §§ 245, subd. (a)(1), 484, subd. (a), 666.)[1] In a separate proceeding, Supek admitted the prior conviction allegations. Supek was sentenced to 6 years for count 3 (double the base term), 1 year and 4 months for count 2, and 5 years for the enhancement under section 667, subdivision (a)(1), for a total sentence of 12 years and 4 months in state prison.

Supek appeals, contending the court should have stayed the sentence on count 2 because the assault with a deadly weapon offense was incidental to the underlying theft offense. We reject his claim of error and affirm the judgment.

BACKGROUND

On July 4, 2007, Alejandro Flores was working as a loss prevention officer at Macy's department store when he observed Supek via closed circuit television monitors selecting clothing in the store in a random manner and taking the clothes to a dressing room. Supek had a computer bag and a duffle type bag with him.

Flores entered the dressing room area and saw Supek removing security sensors and putting the items into his bags. Supek then left the store without paying.

Flores approached Supek outside the store, identified himself as a loss prevention officer, and asked Supek to come back inside the store with him. Supek became very agitated and began swearing at Flores. Flores grabbed Supek's arm and attempted to restrain him, but Supek turned around. Flores tripped Supek, and they both fell to the ground while Flores continued to try to handcuff Supek. During the struggle, the bags fell off Supek. Supek was saying "Let me go, let me go."

As they struggled, Supek managed to get on top of Flores. Flores could see Supek pressing a "shank" against Flores's upper stomach. He felt like Supek was trying to stab him, so Flores kicked Supek off of him and let him go. Supek ran across the parking lot

---

[1] All statutory references are to the Penal Code unless otherwise indicated.

and out of Flores's sight. The "shank," a screwdriver, made a couple of red gashes or scrapes on the left side of Flores's stomach.

Flores recovered the stolen items as well, as items stolen from other stores**.**

Several days later, Supek was spotted and apprehended at the Commerce Casino.

Supek was charged by amended information with: (1) robbery (Pen. Code, § 211); (2) petty theft with a prior felony conviction (*id*., § 484, subd. (a) & § 666); and (3) assault with a deadly weapon (a screwdriver) (*id*., § 245, subd. (a)(1)). It was further alleged that Supek was armed with a deadly weapon (a screwdriver) when he committed or attempted to commit the first offense, within the meaning of section 12022, subdivision (b)(1), and had suffered a prior felony "strike" conviction and two prior drug related convictions. Following a jury trial, Supek was acquitted of count 1 and convicted of counts 2 and 3. He admitted the prior conviction allegations in a separate proceeding.

At sentencing, the trial court used count 3 as the principal offense and imposed the midterm of 3 years, which was doubled pursuant to section 1170.12, subdivisions (a) through (d) and section 667, subdivisions (b) through (i), for a total of 6 years. Supek was sentenced to an additional 5 years under section 667, subdivision (a)(1) for a total of 11 years on the assault count. On count 2, Supek was sentenced to a consecutive term of one-third of the midterm, 8 months, which was doubled pursuant to section 1170.12, subdivisions (a) through (d) and section 667, subdivisions (b) through (i), for a total sentence of 12 years and 4 months.

Supek timely filed the instant appeal from the judgment.

DISCUSSION

Supek contends the trial court should have stayed the shorter sentence because the assault offense was incidental to the theft offense.

Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 thus prohibits punishment for two offenses arising from the same act or from a series of acts

constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Latimer*, *supra*, 5 Cal.4th at p. 1208.) On the other hand, if the defendant entertained multiple criminal objectives that were independent and not incidental to each other, he "may be punished for each statutory violation committed in pursuit of each objective," even though the violations were otherwise part of an indivisible course of conduct. (*People v. Harrison*, *supra*, 48 Cal.3d at p. 335; see *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 463–466 [trial court properly imposed separate sentences for burglary and assaults with a deadly weapon where the assaults were committed in response to the unforeseen circumstance of the approach of the Sears security guards].) "'The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple.' [Citation.] 'A defendant's criminal objective is "determined from all the circumstances . . . ."'" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

Whether section 654 is factually applicable to particular circumstances is a question for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) Its findings will not be reversed on appeal if there is any substantial evidence to support them. (*Ibid*.) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

According to the evidence, Supek entered Macy's prepared, at the very least, to remove security sensors from clothing. And, in fact, after he walked out of the dressing room, Flores did find several broken security sensors. Although one item of clothing remained in the dressing room, and Supek placed two more items on a rack on his way

out, more items were unaccounted for. As Flores testified, "he came out with more bags, more bags and the bags were full. They were full . . . to the brim. They were just full." Supek walked past several cash registers and did not stop, exiting the store through the handbags section without paying. At that point, the theft was complete.[2]

The evidence also showed that Flores confronted Supek and identified himself; Supek became agitated and tried to leave. Flores attempted to physically restrain Supek, and the two ended up "roll[ing] around" on the ground, Supek saying, "[l]et me go, let me go." Supek gained the upper hand and pressed a shank or a screwdriver into Flores's stomach. Flores felt like Supek was trying to stab him, so he kicked Supek off of him. Supek then fled. Flores discovered marks on his stomach where Supek had pressed the weapon against him.

This course of events supports an inference that Supek's initial intent was to steal clothing from Macy's, while his intent and objective in pressing the shank into Flores's abdomen was to effect his getaway. Supek succeeded in achieving these distinct and separate objectives.[3] The closeness in time of the events is immaterial: "'It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.'" (*People v. Hicks* (1993) 6 Cal.4th 784, 789, quoting *People v. Harrison*, *supra*, 48 Cal.3d at p. 335; see *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1393 ["multiple punishment . . . may be imposed where the defendant commits two crimes in pursuit of two independent, even if simultaneous,

---

[2] In fact, during closing argument, Supek's counsel said: "First off, we know—and I'll be the first one to tell you, we know that the prosecutor has proven that my client committed a theft. There's no issue about that. He went into a store, he took some merchandise, and he left the store. It's a theft. They've proven that. Find him guilty of that." Closing argument is not evidence, of course.

[3] Again, during closing argument, Supek's counsel stated: "He committed an assault. Find him guilty of an assault, simple assault. Obviously, we know that something happened where there was a scuffle, there was a fight. An object was more than likely used, we know that. Fine. The prosecutor has proven that."

objectives."]; *People v. Hooker* (1967) 254 Cal.App.2d 878, 880–881 [section 654 prohibition on multiple punishment did not apply where one act (petty theft) was concealing merchandise on the person in the drugstore and other (battery) involved striking officer outside the drugstore], disapproved of on other grounds in *People v. Corey* (1978) 21 Cal.3d 738, 746.) As in *People v. Hooker*, "[Supek's] objective in concealing merchandise was to steal it. [Supek] substantially achieved that objective at the time he pocketed the merchandise in the store, an achievement made legally conclusive when he later stepped outside the store premises without paying for it. On the other hand, [Supek's] objective in [assaulting Flores] was to avoid arrest, an objective which had no essential connection with the petty theft he had completed at an earlier time." (*People v. Hooker*, *supra*, 254 Cal.App.2d at p. 880.) We note, as did the court in *Hooker*, that petty theft and assault with a deadly weapon "comprised different kinds of crime, one against property, the other against the person; committed at different times; performed in different locations; and directed against different victims." (*Id*. at p. 881.) Substantial evidence thus supports the trial court's decision to impose two separate sentences.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

WEISBERG, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

---

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.